

2010 WL 942399 (Tex.Dist.) (Trial Pleading)
District Court of Texas.
Harris County

Colene Kirkpatrick JOINER and Ryan Kirkpatrick Individually
and as Legal Guardian of Hugh Kirkpatrick, Plaintiffs,

v.

Michael CLAY, Don Rotholz, Rebecca Rotholz Broesche and Lee Rotholz, Defendants.

No. 2010-14718.
March 5, 2010.

Plaintiffs' Original Petition

Bohreer & Zucker llp, By: [E. Michelle Bohreer](#), State Bar No. 06717100, [Todd J. Zucker](#), State Bar No. 22260495, 1601 Westheimer Road, Houston, Texas 77006, Telephone: (713) 526-8100, Telecopier: (713) 526-8105, Attorneys for Plaintiffs, Colene Kirkpatrick Joiner and Ryan Kirkpatrick, Individually and as Legal Guardian of Hugh Kirkpatrick.

Court: 061

TO THE HONORABLE JUDGE OF SAID COURT:

COMES NOW COLENE KIRKPATRICK JOINER AND RYAN KIRKPATRICK, INDIVIDUALLY AND AS LEGAL GUARDIAN OF HUGH KIRKPATRICK, Plaintiffs herein, and files this Original Petition complaining of and against MICHAEL CLAY, DON ROTHOLZ, REBECCA ROTHOLZ BROESCHE and LEE ROTHOLZ, as such causes of action and requests for relief, respectfully states the following:

I.

DISCOVERY CONTROL PLAN

1. This lawsuit is governed by Level 2 of [Texas Rule of Civil Procedure 190.3](#).

II.

PARTIES

2. COLENE KIRKPATRICK JOINER, individually and as legal guardian of Hugh Kirkpatrick, is an individual residing in Harris County, Texas.

3. RYAN KIRKPATRICK, individually and as legal guardian of Hugh Kirkpatrick, is an individual residing in Harris County, Texas.

4. Defendant MICHAEL CLAY, is an individual residing in Tarrant County, Texas and may be served with citation and other process by serving him at his home address of 1009 Woodbriar Drive, Grapevine, Texas 76051.

5. Defendant DON ROTHOLZ, is an individual residing in Burleson County, Texas and may be served with citation and other process by serving him at his home address of 1224 Juniper Lane, Burleson, Texas 76028.

6. Defendant REBECCA ROTHOLZ BROESCHE, is an individual residing in Harris County, Texas and may be served with citation and other process by serving her at her home address of 4824 Willow Street, Bellaire, Texas 77401-4416.

7. Defendant LEE ROTHOLZ, is an individual residing in Tarrant County, Texas and may be served with citation and other process by serving him at his home address of 1622 Hyland Greens Drive, Grapevine, Texas 76051.

III.

JURISDICTION AND VENUE

8. Jurisdiction is proper in this Court because the action involves an amount in controversy within the jurisdictional limits of this Court and all or substantially all of the transactions occurred in the State of Texas.

9. Pursuant to Texas Civil Practices & Remedies Code, § 15.002, venue is proper in Harris County, Texas because all or substantially all of the transactions that form the basis of this lawsuit occurred within Harris County, Texas.

IV.

FACTUAL BACKGROUND

10. **Elder abuse**, fraud, undue influence, breach of fiduciary duty, theft, all concealed and hidden from Hugh Kirkpatrick's own children, so that the Defendants could use Hugh Kirkpatrick's own money, and his separate property, to pay their own bills and their mother's bills.. This despicable scheme of the Defendants began when the Defendants moved Hugh Kirkpatrick from his home of 19 years. They moved him and his property without a even a word to Mr. Kirkpatrick's children. They took over his mail and bank account and they cleaned out his safety deposit box. They moved him to an apartment where they left his possessions in bags and boxes. He could not even access his medicine and clothing as he was incapable of unpacking and setting up his own possessions. They gave him no bed to sleep in and refused to let him take his reading chair, forcing him to go without a chair or lamp for reading. They insisted his car be sold. He was a virtual prisoner. Hugh Kirkpatrick's children were forced to get permission to see their father.

11. On July 27, 2007, Defendants moved Plaintiffs' father once again without his children having any input in his whereabouts or his care. They abandoned Hugh Kirkpatrick in an extended care facility 53 miles away from his daughter and left him alone and without a phone to communicate with his family or any of his personal belongings. It was days before they knew where their father had been moved. The Plaintiffs immediately sought legal assistance to help their father and were forced to file for legal, guardianship.

12. Colene Kirkpatrick Joiner and Ryan Kirkpatrick obtained guardianship over their father on August 18, 2008 in Cause No. 374,661 in Probate Court No. 3 in Harris County, Texas. The Defendants fought such guardianship vigorously, likely knowing that when Colene Kirkpatrick Joiner and Ryan Kirkpatrick became the guardian over the person and the finances of Hugh Kirkpatrick, their scheme, their fraud and their criminal behavior would be uncovered.

13. As the year long battle for guardianship endured, the Defendants continued to misappropriate Hugh Kirkpatrick's mail, social security benefits, investments, and his oil royalties. It was later learned that Defendants diverted Hugh Kirkpatrick's mail to their addresses and added their names to his bank accounts. Defendants then moved Hugh Kirkpatrick's separate property monies into a community property account from which they, at their discretion, paid bills such as cell phone and insurance bills to enrich their inheritance without regard to Hugh Kirkpatrick's care or needs. Defendants did not, however, pay Hugh

Kirkpatrick's taxes or all of his bills, forcing his credit to suffer. Defendants neglected paying his pharmacy bill for over nine (9) months.

14. Defendants abandoned Hugh Kirkpatrick and did not visit him for six (6) months. During this time, Colene Kirkpatrick Joiner visited her father every week to help repair the damage to their relationship caused by the Defendants' virtual "brain washing" of Hugh Kirkpatrick during the time of their control over him. A day before one of Colene Kirkpatrick Joiner's weekly visits, Ryan Kirkpatrick had gotten a call from one of the Defendants to tell him that their father had suffered a fall the day before. Defendants had taken Plaintiffs' father out of the facility without informing them and without signing him out from the facility as was required and he had fallen at a restaurant. No one called an ambulance or sought medical help for this 84 year old man. Defendants simply returned him to the facility. The next day, Colene Kirkpatrick Joiner went to visit Hugh Kirkpatrick. One of the Defendants Rebecca Rotholz Broesche and her mother were there. Colene Kirkpatrick Joiner was shocked when she saw her father slumped over in a wheelchair, in serious pain and complaining of being miserable. Colene Kirkpatrick Joiner told her father she was getting help for him and she immediately began making phone calls. Colene Kirkpatrick Joiner made arrangements with the doctor to have Hugh Kirkpatrick transported to the hospital by ambulance. While in the emergency room, Colene Kirkpatrick Joiner was told that Hugh Kirkpatrick had a broken hip and was suffering from pneumonia. Hugh Kirkpatrick had been suffering with this for five (5) days without proper medical care. This 84 year old man had to endure surgery on his hip and consequential months of being bedridden because of his injuries.

15. The efforts for guardianship continued on behalf of the Plaintiffs and the concealment of the Defendants as to their own misconduct had reached new heights.

16. Finally, after the guardianship was resolved in favor of the Plaintiffs and the Plaintiffs worked tirelessly to retrieve Hugh Kirkpatrick's few remaining belongings, Colene Kirkpatrick Joiner was able to discover financial records showing the Defendants' pattern and practice during the time of their control over Hugh Kirkpatrick. Documentation evidencing the Defendants' control of Hugh Kirkpatrick's oil royalties, sending those royalties to Don Rotholz's home address, canceled checks with Rebecca Rotholz Broesche's handwriting showing "for deposit only," with the checks being put into a community bank account, the Defendants controlled receipts showing use of Hugh Kirkpatrick's money for expenses clearly unrelated to his care, but instead for the benefit of the Defendants.

17. Hugh Kirkpatrick had kept his separate property oil royalties in a separate property bank account when he was in control over his affairs. The Defendants had no right or entitlement to his investments or his oil royalties. Rebecca Rotholz Broesche added her name to the community property bank account that Hugh Kirkpatrick had with his wife. Rebecca Rotholz Broesche then changed the address for that same account to the address of Don Rotholz. Defendants used Hugh Kirkpatrick's money for expenses clearly unrelated to his care, and instead for the benefit themselves. Defendants had used Hugh Kirkpatrick's money for legal fees to fight Plaintiffs' guardianship.

18. The Plaintiffs continued to try to recover Hugh Kirkpatrick's personal belongings but were denied access to the home that he lived in for 19 years by the Defendants. Defendants closed his bank safety deposit box and continue to hold his possessions. Defendants have stolen Hugh Kirkpatrick's personal property and possessions and refuse to this date to return them to Hugh Kirkpatrick, despite demand.

19. The Defendants engaged in an ongoing breach of fiduciary duty to Hugh Kirkpatrick, the fiduciary duty of which was created when the Defendants assumed control over Hugh Kirkpatrick, his finances and his person. Such control lead Hugh Kirkpatrick to believe that a special relationship of trust and confidence existed, such that he could rely on the Defendants acting in his best interest and not their own.

20. The Defendants, through their neglect and lack of attention caused Hugh Kirkpatrick to suffer physically, emotionally and financially.

21. The Plaintiffs have attempted to resolve this matter to no avail and, as such, were forced to hire the law firm of Bohreer & Zucker LLP to prosecute this claim.

22. All conditions precedent to the Plaintiffs' ability to bring the causes of action set forth herein have been performed, have occurred or have otherwise been satisfied.

IV.

CAUSE OF ACTION AND THEORIES OF RECOVERY

A. FIRST CAUSE OF ACTION: BREACH OF FIDUCIARY DUTY

23. The foregoing paragraphs are incorporated herein by reference.

24. The Defendants exercised control over Hugh Kirkpatrick's person and his finances and, in doing so, assumed a fiduciary duty and created a fiduciary relationship with Hugh Kirkpatrick, which Hugh Kirkpatrick was entitled to rely on. This relationship that was created required the Defendants to act in Hugh Kirkpatrick's best interest and not their own. The Defendants breached their fiduciary duty to Hugh Kirkpatrick and, as a result, Hugh Kirkpatrick suffered damages. The damages proximately caused by the Defendants' breach of fiduciary duty exceed the minimum jurisdictional limits of this Court. Hugh Kirkpatrick will seek to recover a maximum of \$450,000 as a result of the Defendants' breach of fiduciary duty.

B. SECOND CAUSE OF ACTION: CIVIL THEFT AND CONVERSION

25. The foregoing paragraphs are incorporated herein by reference.

26. The Defendants used Hugh Kirkpatrick's money and belongings for their own benefit and personal expenses without Hugh Kirkpatrick's consent. In fact, the Defendants' action cannot be justified through a defense of relying on their mother's consent, because such individual has expressly denied consent under oath. Even further, to the extent Mary Kirkpatrick allegedly authorized the use of Hugh Kirkpatrick's separate property funds, such authorization does not excuse or negate the civil theft and conversion committed by the Defendants herein. Hugh Kirkpatrick has suffered actual damages in excess of the minimum jurisdictional limits of this Court as a result of the Defendants' civil theft and conversion. Hugh Kirkpatrick will seek to recover no more than \$450,000 as a result of the Defendants' civil theft and conversion.

C. THIRD CAUSE OF ACTION: ELDER ABUSE

27. The foregoing paragraphs are incorporated herein by reference.

28. The conduct of the Defendants constitutes **elder abuse** under the Texas statutes and the common law regarding the same. The Defendants' neglect and abandonment provides a cause of action that runs in favor of Hugh Kirkpatrick, and can be prosecuted through his guardians. Hugh Kirkpatrick has suffered actual damages, including mental anguish and neglect as a result of the abuse from the Defendants. Hugh Kirkpatrick's damages with respect to his **elder abuse** claim exceed the minimum jurisdictional limits of this Court. Hugh Kirkpatrick will seek to recover maximum damages of \$500,000 under his claim for **elder abuse**.

29. Because Defendants' actions were both wanton and willful, the Plaintiffs seek to recover punitive damages in addition to the actual damages suffered. Plaintiffs seek to recover punitive damages in an amount deemed just and proper by the trier of fact, but to exceed \$2,000,000.

D. FOURTH CAUSE OF ACTION: FRAUD AND FRAUDULENT CONCEALMENT

30. The foregoing paragraphs are incorporated herein by reference.

31. The Defendants set out on a scheme of fraud, both through affirmative misrepresentations as to the use and extent of Hugh Kirkpatrick's money, as well as with respect to his physical care and location. The Defendants failed to disclose material information with respect to Hugh Kirkpatrick's finances and care to Colene Kirkpatrick Joiner and Ryan Kirkpatrick in order to induce the Plaintiffs to rely on these representations such that the Defendants' fraud and use of Hugh Kirkpatrick's money could continue. Plaintiffs have suffered actual damages as a result of the fraud and the fraudulent concealment. Such damages are within the minimum jurisdictional limits of this Court. Ryan Kirkpatrick and Colene Kirkpatrick Joiner will seek to recover maximum damages in the amount of \$500,000 as a result of this fraud.

32. Because Defendants' actions were both wanton and willful, the Plaintiffs seek to recover punitive damages in addition to the actual damages suffered. Plaintiffs seek to recover punitive damages in an amount deemed just and proper by the trier of fact, but to exceed \$2,000,000.

E. FIFTH CAUSE OF ACTION: NEGLIGENCE

33. The foregoing paragraphs are incorporated herein by reference.

34. The Defendants owed Hugh Kirkpatrick a duty of care by virtue of the Defendants' exercise of control over Hugh Kirkpatrick's person and his money. The Defendants breached the standard of care with respect to Hugh Kirkpatrick and Hugh Kirkpatrick suffered actual damages as a result thereof. Hugh Kirkpatrick's actual damages are in excess of the minimum jurisdictional limits of this Court. Hugh Kirkpatrick seeks to recover maximum damages as a result of the Defendants' negligence in the amount of \$450,000.

E. ATTORNEY'S FEES

35. The foregoing paragraphs are incorporated herein by reference.

36. To the extent allowed by law, Plaintiffs seek to recover reasonable and necessary attorneys' fees and costs incurred to prosecute this matter.

WHEREFORE, PREMISES CONSIDERED, Plaintiffs COLENE KIRKPATRICK JOINER AND RYAN KIRKPATRICK, INDIVIDUALLY AND AS LEGAL GUARDIAN OF HUGH KIRKPATRICK, respectfully request that Defendants MICHAEL CLAY, DON ROTHOLZ, REBECCA ROTHOLZ BROESCHE and LEE ROTHOLZ be cited to appear and answer herein, and that, upon a final trial of this cause, judgment be entered for Plaintiffs for:

- (a) all damages, direct, indirect, actual, incidental, consequential, general and special, resulting from the Defendants' conduct;
- (b) punitive damages;
- (c) pre and post- judgment interest as allowed by law;
- (d) costs of court;
- (e) reasonable and necessary attorneys' fees; and
- (e) any and all further relief to which Plaintiffs may show themselves entitled.

Respectfully submitted,

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